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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 316

ISIDORE B. BERNSTEIN,

Petitioner,

against

EMS CORPORATION,

Respondent,

and

LEOPOLD OLIAN and MORRIS CANTOR, co-partners doing business under the firm name and style of OLIAN & CANTOR,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BARENT TEN EYCK, counsel on behalf of ISIDORE B. BERNSTEIN, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered May 24, 1949, (1) reversing the judgment and order of the United States District Court for the Southern District of New York which denied Respondent EMS CORPORATION's, motion under Rule 50(b) of the Federal Rules of Civil Procedure, to set aside the ver-

dict and dismiss the complaint or in the alternative, to set aside the verdict and order a new trial; and (2) ordering the complaint herein dismissed on the ground that there was insufficient evidence to sustain the jury's verdict in favor of petitioner and against respondent.

Opinions Below

The opinion of the District Court (RIFKIND, *J.*) (R. 420-426) is reported at 77 F. Supp. 672. The opinion of the Court of Appeals (Swan, J. with Hand, C. J., and Frank, J.) (R. 434-437) is reported at 174 F. 2d 880.

Jurisdiction

The judgment of the Court of Appeals was entered on May 24, 1949 (R. 438). A timely petition for rehearing was filed on June 8, 1949 and was denied by the Court of Appeals on June 13, 1949 (R. 439-449). The jurisdiction of this Court is invoked under Sec. 1254 of Title 28 of the United States Code.

Questions Presented

Whether, after a District Judge had denied a motion for judgment n.o.v. and entered judgment on the jury's verdict, which was amply supported by evidence of record, a United States Court of Appeals has the power (1) to overturn the jury's verdict and (2) itself to order entry of judgment n.o.v., or whether such power exists only "when there is a complete absence of probative facts to support the conclusion reached". *Lavender* v. *Kurn*, 327 U. S. 645, 653.

Constitution and Statutes Involved

The provisions of the Seventh Amendment of the Constitution of the United States, and of Rule 50(b) of the Federal Rules of Civil Procedure (adopted by this Court pursuant to the Act of June 19, 1934, c. 651 48 Stat. 1064) are set forth in Appendix A, p. 23, *infra*.

Statement

On July 2, 1945, petitioner, a normal and healthy citizen of Los Angeles, aged 45, walked into the store of Olian & Cantor at 257 West 39th Street, New York City, to purchase cloth for use in his sportswear manufacturing business (R. 53, 195). Within less than an hour, petitioner was carried out of the store to Bellevue Hospital, permanently disabled because a heavy hanging lighting fixture and portions of the ceiling to which it was attached by a chain had crashed down upon his head (R. 53-54). There is no question but that petitioner, who had never before been in the store, was wholly blameless, or that the lighting fixture was defectively attached to the ceiling which had been subjected to unusual stresses and strains.

Petitioner brought this personal injury action against both Olian & Cantor, the tenant, and respondent Ems Corporation, the landlord, in part of whose 16 story building the store was located (R. 195, 240). On the evidence presented at a trial before Judge NORDBYE, a jury of 12 representative citizens concluded that both the landlord and tenant were at fault and that petitioner should recover $7,000 from the defendants. Judge NORDBYE not only denied defendants' motions, made at the completion of petitioner's case, to direct a verdict, but ultimately set the verdict aside

as "patently inadequate"[1] and ordered a new trial. On the evidence presented at the second trial, another jury of 12 representative citizens concluded that the tenant was not at fault, that all the fault lay with the landlord and that the landlord should pay $102,500 to petitioner to indemnify him for his medical expenses and permanent disability.[2] The District Judge (RIFKIND, *J.*) agreed with the jury and sustained its verdict over the landlord's motion for judgment notwithstanding the verdict.

Yet the Court of Appeals for the Second Circuit, which neither saw nor heard the evidence, determined, on respondent's appeal from Judge RIFKIND's order, that the record was insufficient to support the conclusion reached by two juries and sustained by two trial judges as to the landlord's fault. The Court of Appeals, on its *own* view of the evidence, concluded not merely that petitioner had not produced sufficient evidence to prove his case, but that he never could do so, and, therefore, it ordered the complaint dismissed.

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[1] The opinion of Judge NORDBYE, which is not reported, is printed as Appendix B, pp. 24-27, *infra*.

[2] The jury's verdict for $102,500 was cut down to $100,000 because the complaint (which petitioner unsuccessfully sought to have amended to claim damages of $150,000) claimed only $100,000. By the date of the second trial herein, petitioner had suffered almost three years of excruciating pain, involving 4 hospitalizations, a serious operation for the removal of a portion of his spine, the wearing of a brace for a year and subjection to tormenting corrective exercises of various kinds of long periods of time (R. 13-32, 54-80). The medical testimony indicated that the fall of the fixture and parts of the ceiling was the cause of the injury (R. 14-20, 25-31) which technically is described as a herniated disc between the 6th and 7th cervical vertebrae and "a very compressed 7th nerve root" (R. 13, 18-19, 25, 33-35). At the time of the second trial, petitioner was still under treatment (R. 78) and suffering pain (R. 77) and his physical condition was such as to prevent normal attention to business (R. 78-79). In addition to medical expenses amounting to $3,000, petitioner has suffered loss of income for 3 years, of between $10,000 and $12,000 annually. And, on the testimony of his doctors, (R. 31-32, 169) since he will never be able to resume the type of work he was used to doing, his earning power in the future will be substantially reduced.

Perhaps the most compelling evidence of the gravity of petitioner's injuries may be found in the fact that Judge NORDBYE set aside, as inadequate, a verdict of $7,000 and Judge RIFKIND stated (R. 426):

> "The only other point which requires mention is the defendant's contention that the amount of the verdict is excessive. The nature of the injury was such that this objection is, in my judgment, without any merit whatever."

As a result, the concededly innocent petitioner must suffier his permanent disability and foot the extensive medical bills without any indemnification from either the tenant or the landlord in whose premises the fixture was defectively attached.

There is no dispute, as both petitioner's expert and the tenant's expert agreed,[1] that the lighting fixture which struck the petitioner, was defectively fastened to the ceiling beam in the store (R. 124-125; 134-135; 259). The fixture and lighting equipment which produced the injury consisted of: a base plate and a unit box, which were the parts immediately attached to the ceiling beam, a decorative canopy covering them, a supporting chain, a bulb and a globe (R. 110-111,, 118-119, 128-129). Two significant defects vitiated the attachment of the fixture to the ceiling.

First, although the base plate had four openings for the insertion of screws (R. 128-129) and proper practice called for the use of four screws (R. 259), the fixture in question was attached to the ceiling by only two screws (R. 119-120, 248-249).

Second, each of the screws was only 1 and $\frac{1}{8}$th of an inch long (R. 120), and was, therefore, not able to penetrate through the outer plaster and into the concrete with which the ceiling beam was covered,[2] with sufficient "purchase" for proper and safe suspension of the fixture (R. 124-125, 134-135, 259).

While the covering canopy concealed these defects from one merely looking up at the ceiling (R. 262), both defects would have been obvious to anyone removing the canopy, or to those who originally installed the fixture. The fact that there were only two, instead of the requisite four,

[1] The landlord, respondent EMS Corporation, called no expert of its own.

[2] There was a two inch covering of concrete around the steel beam from which this lighting fixture was suspended (R. 128, 240-241, 248), and covering the concrete there was a layer of plaster from ¼ to ¾ of an inch thick (R. 248).

screws, would appear merely from looking at the uncovered base plate. And, as the tenant's expert conceded, the fact that the screws were too short would result, immediately upon their insertion, in pulverizing the plaster surrounding the base plate (R. 260-262);[1] and this would be visible to anybody looking at the plaster.

The record also shows that up to the time of the accident there was continuous jarring of the entire ceiling, caused by cases of rayon being thrown about by the tenant upstairs (R. 224-226). The tenant's expert testified that "excessive vibration due to cases being thrown on the floor above", if kept up and mounting "over a period of time", would cause cracking of the ceiling plaster and thus loosen the already inadequately fastened fixture (R. 262-263). As a result, it required no more than Mr. Olian's pulling the drop chain in attempting to turn on the light, as he did on July 2, 1945, when petitioner entered his store, to bring down the fixture and portions of the ceiling on petitioner's head (R. 53-54).

While there was no question that petitioner was injured as a result of the fact that the fixture was improperly and unsafely attached and that there were continuous stresses on the ceiling, there was considerable dispute as to who was liable therefor.

The tenant and the landlord each denied sufficient control over the ceiling beam and the lighting fixture to predicate the imposition upon it of any duty of care.[2]

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[1] Fixtures such as are here involved, are properly installed by drilling holes through the ceiling plaster into the concrete, inserting "rawl plugs" (made of treated jute fibre, such as were here used) (R. 129, 239, 249-250) or "keystone plugs" (made of metal) (R. 123) and then putting in screws of a type appropriate to the plugs selected (R. 121-123, 129-130). The function of the screws is to expand the plugs, causing tension against the holes in the concrete, and thus firmly supporting the fixtures (R. 129). When such screws are too short, the result is to expand the plugs against the *plaster*, rather than against the concrete, and to cause the plaster to crumble and pulverize, thus leaving the fixture improperly and unsafely suspended (R. 260-262).

[2] Olian and Cantor's lease from Ems (Plaintiff's Exhibit 11; photostatic copies of which are submitted with the record on appeal) among other things:

Apart from the question of control, the landlord made a considerable issue of its lack of knowledge or reasonable cause to know of the dangerous condition of the ceiling. On this question, the record shows that Olian and Cantor had complained of the jarring and vibration of the ceiling caused by the movement of heavy cases of rayon by the neighboring tenant above Olian & Cantor's store and that this condition had, by the time of the trial, been remedied (R. 234). These complaints had been made some time early in 1942 to the superintendent of the building (R. 233-234). He maintained a large staff of employees to supervise the safety and maintenance of the building (R. 300); and he visited the premises on a number of occasions for maintenance purposes (R. 297) but never removed the canopy covering the base plate here involved (R. 301), although

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(a) Gave Ems the right to enter the demised premises at all times to make such repairs, alterations and improvements as it deemed necessary or desirable (par. 16).

(b) Provided that Ems' entry for such purpose should not constitute an eviction or abate any part of the rent (par. 5).

(c) Prohibited Olian and Cantor, as tenants, from marking, painting, drilling into or in any way marring or defacing any part of the demised premises (par. 4).

(d) Prohibited Olian and Cantor from boring, cutting or stringing wires (par. 4).

(e) Charged Olian and Cantor, as tenants, with the expense of such repairs, only, as should be necessitated by their own carelessness or negligence, or by that of their servants, visitors and licensees (par. 5).

(f) Provided that Ems should not be liable for injuries to persons or property resulting from falling plaster, unless caused by Ems' negligence (par. 10).

(g) Obligated Olian and Cantor to permit Ems to erect, use and maintain the pipes and conduits in and through the demised premises (par. 16).

(h) Permitted Ems to enter the demised premises for the above purposes by force, if necessary, without being liable therefor (par. 16).

When Olian and Cantor first moved into their store, under a lease from Ems' predecessor in title, all the electric lighting fixtures and appurtenant chains were already present, suspended from a ceiling beam; but there were no globes or bulbs (R. 196-197, 208-210, 298). Olian and Cantor had these, and a decorative canopy, installed (R. 196, 210). However, they had nothing at all to do with the installation of the supporting fixtures themselves (R. 196). Those remained unaltered and untouched, as originally installed, up to the time of the accident to the petitioner (R. 197-198).

It was admitted by Ems that after the accident employees of Ems removed the debris and that the ceiling was repaired at Ems' expense and at Ems' initiation (R. 285, 185, 186).

its removal entailed only a simple 15 second operation that required no special skill (R. 264). Respondent, Ems Corporation, which purchased the building from the previous owner in November, 1942 (R. 209, 236), retained the services of the same building superintendent who had served its predecessor (R. 278-279), and to whom Olian & Cantor's complaints had been addressed.

In sum, as the District Court pointed out (R. 420-421):

> "The jury could find as to the Ems Corporation (hereinafter Ems): (1) Ems was the owner of the building and the lessor of the store premises where the accident causing the injuries suffered by the plaintiff occurred; (2) Ems had reserved the right to enter the premises to make repairs; (3) Ems was obliged to make repairs at its own cost if the damage or condition was not caused by the negligence of the tenant; (4) Ems prohibited the tenant from painting, drilling into or in any way marring or defacing any part of the demised premises; (5) the repair of the dangerous condition which caused the electric fixture and part of the ceiling to fall and strike the plaintiff called for both drilling and painting; (6) Ems employed a large staff of maintenance employees in connection with the operation of the multi-story building of which the store premises were a portion; (7) Ems' building superintendent frequently visited the store premises in connection with his duties; (8) for some time prior to the fall of the electric fixture, the tenant on the floor above the store premises trundled heavy parcels in such a manner as to cause violent vibration of the ceiling of the store premises; (9) a considerable time before the accident, notice of these vibrations was given to the landlord's agents by the tenants, Olian and Cantor; (10) immediately after the accident Ems' employees took away the debris; (11) shortly thereafter Ems caused the repairs to be made at its own expense and on its own initiative; (12) Ems had control of the site of the danger; (13) reasonable care required inspection of the ceiling and its lighting fixture, at least after notice of the stresses to which the ceiling was subjected; (14) such inspection was simple and

could readily be performed; (15) inspection would have revealed the danger; (16) Ems was negligent in that by the exercise of reasonable care it could have discovered the condition, realized that it involved an unreasonable risk to business visitors and made the condition safe. (Restatement of Torts, § 343; Restatement of Torts, § 361)."

On the basis of the foregoing evidence, the jury concluded that respondent Ems Corporation was negligent, and defendants Olian and Cantor were not negligent. In view of the grave injuries which have rendered petitioner permanently disabled and caused him substantial medical expenses, the jury rendered a verdict of $102,500.00.[1]

Subsequent to the jury's verdict, respondent Ems Corporation moved under Rule 50 (b), for a new trial, or in the alternative, for judgment notwithstanding the verdict, and petitioner moved to set aside the verdict in favor of Olian & Cantor. In a careful and thorough opinion, the District Judge denied the motion of respondent. Subsequently he denied the motion of petitioner. The District Court entered judgment in favor of petitioner on the jury's verdict.

The Court of Appeals for the Second Circuit reversed the order of the District Judge, and directed the dismissal of the complaint, solely on the ground that the evidence in the record was insufficient to sustain the jury's verdict that respondent, Ems Corporation, knew or had reasonable cause to know of the dangerous nature of the ceiling.

Specification of Errors to be Urged

The Court below erred:

(1) In failing to affirm the order of the District Court denying respondent Ems Corporation's motion for a new

[1] See *supra*, p. 4, n. 2.

trial, or in the alternative for judgment notwithstanding the verdict, and in failing to affirm the judgment of the District Court.

(2) In reversing the order of the District Court denying respondent Ems Corporation's motion for a new trial or in the alternative for judgment notwithstanding the verdict, and in directing the dismissal of the complaint.

Reasons for Granting the Writ

Rule 38 (5) (b) of the Rules of this Court lists five considerations, any one of which might impel this Court to grant certiorari. Over and above the shocking result of the decision in this case, which of itself suggests that the Court of Appeals "has so far departed from the usual and expected course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision", we submit that not one, but four, of the five considerations adverted to in Rule 38 (5) (b) are here present.

In *Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 243, this Court suggested that a United States Court of Appeals has the power not merely to reverse a District Court's order denying a motion for a new trial, but also to reverse a District Court's order denying a motion for judgment notwithstanding the verdict, and *"itself [to] enter judgment n.o.v."* (254) (emphasis supplied). In *Cone* v. *West Virginia Pulp & Paper Co.,* 330 U. S. 212, this Court decided that a Court of Appeals, if convinced that the jury's verdict is wholly without support in the evidence, should not itself direct entry of judgment n.o.v., but should remand the case to the District Court for that Court to exercise its "primary discretionary responsibility" as to whether to dismiss or to order a new trial. See also *Globe Liquor Co.* v. *San Roman,* 332 U. S. 571; and compare *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474, 481-482.

If the suggestion in the *Montgomery Ward* case may constitutionally,[1] and under the Federal Rules, prevail over the rulings in the *Cone* and *Globe Liquor* cases, the conclusive nature of the power to overturn a jury's verdict for lack of support in the evidence, which is thus reposed in a court far removed from the live testimony and the atmosphere of the trial, underscores the importance of the rigorous limitations this Court has prescribed upon the lawful exercise of such power.

The question presented in this case is whether the governing norm invoked by the Court of Appeals to determine when it may conclusively reverse a jury's verdict, and deny to the district judge an opportunity to exercise his "primary discretionary responsibility", conforms to the rigid restrictions with which this Court has circumscribed the exercise of such power. We submit that it does not, and the magnitude and importance of the Court of Appeals' misconception of its power in this matter are sufficiently far reaching to call for the exercise of this Court's corrective authority.

First: The decisions here prohibit a court—whether appellate or trial—from "reweighing" the evidence upon which the jury reached its verdict, or itself assessing the validity of the jury's inferences from the evidence. They teach that "only when there is a complete absence of probative facts to support the conclusion reached" by the jury (*Lavender* v. *Kurn*, 327 U. S. 645, 653) or when the jury's verdict is "without support in the evidence" (*Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, 35) may a court exercise its power to overturn a jury verdict and dismiss the complaint. The narrow scope thus accorded for exercise of the power conclusively to terminate the case by rejecting a jury's verdict is accentuated by the less confining

[1] Compare *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, and *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389 with *Baltimore & C. Line* v. *Redman*, 295 U. S. 654.

limitations upon the exercise of the power to order a new trial,—and thus to offer plaintiff an opportunity to correct a deficiency of proof—[1] which may be invoked when the Court finds that the jury's verdict is "against the weight of the evidence". *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 250-251. Compare *Simmonds* v. *Capital Transit Co.*, 147 F. 2d 570 (App. D. C.).

Against the background of such restrictions upon a Court's power to overturn a jury's verdict, this Court only recently elaborated upon the peculiarly limited competence of a Court of Appeals to order entry of judgment n.o.v., when it insisted that the District Judge, rather than the Court of Appeals, should determine, at least in the first instance, whether the state of the evidence called for a new trial rather than for judgment n.o.v. Because it is the trial judge, and not the appellate court, "who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart", his is the "primary discretionary responsibility" to determine whether to foreclose the litigant completely or to authorize a new trial. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212, 216; *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571. Precisely the considerations upon which the decision in the *Cone* case rests (compare *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 481-482) underlie the "rigor of the rule" (*Simmonds* v. *Capital Transit Co., supra*) which permits an appellate court to reverse the Trial Court, and itself to direct the entry of judgment n.o.v. only when "there is a complete absence of probative facts to support the conclusion reached" by the jury.

That the Court of Appeals for the Second Circuit conceives its power conclusively to overturn a jury verdict as reaching considerably beyond the narrow area to which this

[1] See e.g. *Shoenfelt* v. *Pennsylvania R. Co.*, 69 F. Supp. 728 (S. D. N. Y.).

Court has thus confined it is apparent from the disposition of this case, as well as from its rulings in other cases.

The Court of Appeals did not dispute that the instant case had been submitted to the jury on instructions which accurately embodied the New York law as to the requisite care and knowledge with which the Landlord was charged in the premises. On the contrary, its opinion effectively adopted, as the substantive law, the District Court's charge to the jury that the landlord was liable if it "knew, or by the exercise of reasonable care, could discover the dangerous condition of the ceiling" (R. 409).[1] Not only does this statement of the standard governing respondent's liability conform to the New York decisions,[2] but it was in no way challenged by respondent, whose vigilant counsel excepted vigorously to the other portions of the charge dealing with the question of respondent's "control" of the premises and the issue of damages (R. 413-414).

The jury's verdict must, therefore, be taken to embody the conclusion that, at least to the jury, the evidence demonstrated that respondent, Ems Corporation, either knew of, or by the exercise of reasonable care should have discovered, the precarious condition of the ceiling and fixture. That there was solid evidence to support this conclusion is apparent from the facts that (1) the fixture was defectively attached to the ceiling (R. 124-125, 134-135,

[1] The Court of Appeals' acceptance of the District Court's charge on this question contrasts significantly with its doubts as to the conformity of the result below to the law of New York on the question whether the lease gave the respondent sufficient control of the premises to render it liable for the injury. The Court of Appeals expressly avoided passing upon that question and disposed of the case wholly upon its conclusion that the evidence was insufficient to sustain the verdict that the landlord knew or had reasonable cause to know of the dangerous condition of the ceiling.

[2] See e.g. *Lusk* v. *Peck*, 132 App. Div. 426, 430-431, 116 N. Y. Supp. 1051 (4th Dept.), affirmed 199 N. Y. 546; *Rosenberg* v. *Rosenberg*, 247 App. Div. 765, 766, 285 N. Y. Supp. 859 (2nd Dept.); *Goodstein* v. *Milmo Realty Corp.*, 8 N. Y. Supp. 2nd 243; *Constant* v. *University of Rochester*, 111 N. Y. 604; *McCutcheon* v. *Dittman*, 164 N. Y. 355; compare *Dittiger* v. *Isal Realty Corp.*, 290 N. Y. 492, 495-496, and *Schroeder* v. *City and County Savings Bank of Albany*, 293 N. Y. 370, 374 on the question of *res ipsa loquitur*.

259); (2) jarring and vibration caused by the moving by crates by the tenants above Olian and Cantor caused stresses upon the ceiling (R. 224-226, 262-263); (3) the defective attachment of the fixture to the ceiling could have been readily seen by the removal of the canopy surrounding the base plate (R. 260-262); (4) the canopy could have been removed in the course of a simple fifteen second inspection (R. 264); (5) respondent Ems Corporation maintained a large staff to care for the safety and maintenance of the building (R. 300); and (6) Olian & Cantor had given notice of the stresses and vibrations affecting the ceiling to the respondent Ems Corporation's agent (R. 233-234),[1] who on a number of occasions visited the premises in the course of performing his duties (R. 297), but never saw fit to inspect the attachment of the fixture to the ceiling (R. 301).

We do not contend that the only conclusion which the jury could have reached under the circumstances was that the landlord knew of the dangerous condition of the ceiling, or even that he should have discovered it by the exercise of reasonable care. That such conclusions could validly be reached by the jury, however, cannot be doubted. And certainly, a record containing the evidence here produced does not disclose "a complete absence of probative facts to support" such a conclusion, or render the jury's verdict "without support in the evidence".

In the face of this record, there can be little question that the Court of Appeals did not simply misread the evidence in this particular case; rather, it attempted to test the propriety of the jury's verdict by itself sifting and weighing the validity of the jury's inferences on the erroneous assumption of an authority to reappraise verdicts that, in fact, is denied to it by the decisions of this Court. Other decisions of the Court of Appeals con-

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[1] Compare *Goodstein* v. *Milmo Realty Corp.*, 8 N. Y. Supp. 2nd 243; *Constant* v. *University of Rochester*, 111 N. Y. 604; *McCutcheon* v. *Dittman*, 164 N. Y. 355.

firm this conclusion. This is not the first case in which that Court's apparent reluctance to accept whole-heartedly the substantive norms of "negligence" embodied in local or federal law has led it to intrude itself into the area of factual determination constitutionally reserved for the jury, and unlawfully to direct the dismissal of a complaint which the evidence was adequate to prove. Twice, in such cases during the past eight years, this Court has reversed the Court of Appeals for usurping the jury's function and has reinstated the jury's verdict. *Conway* v. *O'Brien*, 111 F. 2d 611, reversed 312 U. S. 492, *Jacob* v. *New York City*, 119 F. 2d 800, reversed 315 U. S. 752.[1] And a third time, in a context other than "negligence", (*Berry* v. *United States*, 111 F. 2d 615, reversed 312 U. S. 450) this Court reversed a ruling of the Court of Appeals dismissing a complaint after a jury verdict had been rendered in favor of the plaintiff.

The opinions of the Court of Appeals since those reversals disclose a continued assertion by that Court of power to dismiss complaints in the teeth of jury verdicts that is denied to it by those, and other, decisions of this Court. Thus in *Fratta* v. *Grace Line, Inc.*, 139 F. 2d 743, 744[2] the Court of Appeals explicitly defined its power to dismiss a complaint as dependant upon whether the verdict in favor of the complainant was "against the weight of the evidence". However valid such a test may be for determining whether to grant a new trial, (cf. *Montgomery Ward & Co.* v. *Duncan, supra*) there can be no doubt that it permits the exercise of a discretion to dismiss a complaint which the decisions of this Court negate. While the Court of Appeals appears to have receded somewhat from the extreme view it expressed in the *Fratta* case (cf. *Binder* v. *Commercial Travelers Mut.*

[1] See also *Brennan* v. *Baltimore & O. R. Co.*, 115 F. 2d 555 (relied upon by the Court of Appeals for the Seventh Circuit in *Cogswell* v. *Chicago & E. I. R. Co.*, 153 F. 2d 94, 97, *rev'd*, 328 U. S. 820); *Williams* v. *New Jersey-New York Transit Co.*, 113 F. 2d 649.

[2] See also *Willis* v. *Pennsylvania R. Co.*, 122 F. 2d 248.

Acc. Ass'n, 165 F. 2d 896), the instant decision and others[1] make plain that it has not receded so far as to forego the power which this Court has denied to it, to itself dismiss the complaint on the basis of its own weighing of the evidence and the validity of the jury's inferences therefrom.

Second: Apart from its assertion of a forbidden power to interfere with jury verdicts, the Court of Appeals has in the instant case, and in the *Binder* case, evolved a procedure under Rule 50 (b) which conflicts with the decisions of this Court in the *Cone* and *Globe Liquor* cases. In the *Binder* case, the Court of Appeals, on reversing the Trial Judge, did not reinstate the verdict, but rather deferred to his "primary discretionary responsibility" as to whether to order a new trial. In the instant case, on reversing the Trial Judge, it ruled conclusively on the motion for judgment n.o.v. and thus denied to the Trial Judge any opportunity to exercise that "primary discretionary responsibility".

As a result, in the Second Circuit, when the Court of Appeals concludes that the evidence is sufficient to sustain a jury's verdict, it will not reinstate the jury's verdict, but will defer to the Trial Judge's exercise of his "primary discretionary responsibility" as to whether to grant a new trial. On the other hand, when it concludes that the evidence is not sufficient to sustain the jury's verdict, it will not defer to the Trial Judge's "primary discretionary responsibility", but will itself terminate the litigation by dismissing the complaint. The litigant who persuades the jury thus finds himself in a curious position: If the appellate court sustains the jury's verdict, but the Trial Judge does not, the verdict cannot prevail—a new trial will be ordered. If the Appellate Court does not sustain the jury's verdict, even though the Trial Judge does, the complaint will be dismissed—a new trial will not be ordered, even

[1] See e.g. *Cannella* v. *Lykes Bros. S.S. Co.*, 174 F. 2d 794, 795.

though the Trial Judge might deem it appropriate. The only time when a litigant who has obtained a jury verdict can prevail is when both the Trial Court and the Appellate Court agree that the verdict is sustainable. In short, in the Second Circuit, the Trial Judge's "primary discretionary responsibility" operates to prevent a litigant from benefiting from a jury verdict in his favor; but it does not operate to preserve for a litigant an opportunity for a new trial.

It may be that a system so weighted against the jury verdict comports with this Court's suggestion in *Montgomery Ward Co.* v. *Duncan, supra;* but it is plainly not consistent with this Court's decisions in the *Cone* and *Globe Liquor* cases. And, in any event, if the procedural opportunities for judicial frustration of jury's verdicts are so ample, it becomes all the more important to require careful adherence to the rigorous limitations this Court has prescribed on the exercise of a Court's power to interfere with a jury verdict.

Third: That the Court of Appeals' assertion of an improperly broad power to direct the entry of judgment n.o.v. conflicts with the more limited power to which Courts of Appeals in other circuits have been confined by the mandate of this Court, emphasizes the need for invoking this Court's corrective influence. Compare *e. g. Mattson* v. *Central Electric & Gas Co.,* 174 F. 2d 215 (C. A. 8); *Terminal R. Ass'n of St. Louis* v. *Schorb,* 151 F. 2d 361 (C. A. 8). And that need is doubly underscored in this case because the Court of Appeals' misconception has produced a plain conflict with the New York decisions, both as to the substantive law of negligence and as to the sufficiency of the evidence to support the jury's verdict (cf. *Lusk* v. *Peck, supra; Rosenberg* v. *Rosenberg, supra; Goodstein* v. *Milmo Realty Corp., supra; Dittiger* v. *Isal Realty Corp., supra;* and compare *Stoner* v. *New York Life Ins. Co.,* 311 U. S. 464).

Fourth: To be sure, in this case the judicial intrusion into the area constitutionally, and by rule, reserved for the jury, does not frustrate a specific substantive policy enacted by Congress. Compare *e. g. Wilkerson* v. *McCarthy*, 336 U. S. 53. Here, the judicial intrusion into the area of factual determination reserved for the jury occurs in the context of Federal judicial frustration of substantive local law. But, tested by the volume of cases in which the problem of judicial interference with jury verdicts may arise in the Federal Courts, the importance of the present context far outweighs that of the F. E. L. A. context.[1] And this case calls compellingly for review of that problem by this Court, both because the facts of record herein raise the question sharply and unequivocally, and because the Second Circuit is, by far, the most important Federal forum for the disposition of personal injury actions.

The facts of this case graphically demonstrate the need for corrective action by this court and the propriety of

[1] The Annual Reports of the Director of the Administrative Office of the United States Courts for the past five fiscal years disclose that of all the non-government civil actions commenced in 84 United States district courts, almost 50% (and in the last year, more than 50%) of the cases initiated on diversity grounds involve the issue of negligence.

The figures, obtained from Tables C.2, C.3 of the Annual Report for 1948, Tables C.2, C.3 of the Annual Report for 1947, Tables C.2 C.3 of the Annual Report for 1946, Tables C.2, C.3 of the Annual Report for 1945, and Tables 6 and 7 of the Annual Report for 1944, follow:

	Private Cases				*Personal Injury*		
	Federal Question	*Diversity*	*F.E.L.A.*	*Jones Act*	*Motor Vehicle*	*Other Negligence*	*Personal Property Negligence*
1948	6,906	10,779	1,038	1,574	2,914	2,207	147
1947	9,298	8,586	799	1,607	2,114	2,060	107
1946	5,085	6,242	661	451	1,368	1,504	65
1945	3,563	5,268	412	384	1,040	1,311	56
1944	3,473	5,233	321	438	1,034	1,220	38
Total	28,325	36,108	3,231	4,454	8,470	8,302	413

It will be noted that diversity cases presenting the issue of negligence arose more than 5 times as frequently as did F.E.L.A. cases and more than 2 times as frequently as did the cases arising under both the Jones Act and the F.E.L.A.

selecting this case as the vehicle for such action. Petitioner, a normal and healthy man of 45, through no fault of his own, and undisputedly because of a defect in the premises, has been permanently disabled and subjected to protracted and painful medical treatment over a period of several years. The decision of the Court of Appeals denies him any recovery at all, and leaves him to suffer without relief while both the landlord and the tenant are left free of all responsibility to an innocent victim of defects in their premises. That decision is in direct contradiction of the opinion of two District Judges and the verdict of two juries, and in flat conflict with the decisions of the New York courts. There is no dispute as to the relevant facts, and the Court of Appeals accepted the District Judge's statement of the governing substantive law. The sole question presented therefore, is as to the scope of the Court of Appeals' power to reject the jury's inferences from the facts.

Not only does this case thus present squarely an important question of judicial power which the Court of Appeals has answered both erroneously (under the decisions here), and in conflict with the decisions of other circuits and of the New York Courts. It brings that question here from the circuit in which its correct resolution has a more pervading importance than it would have in any other circuit. Personal injury actions, revolving around the issue of "negligence" arise far more frequently in the Second

Circuit than in any other circuit.[1] The need for correction of the improper relationship of court to jury now prevailing in the Second Circuit is therefore more compelling than would be a similar need in any other circuit. Whatever considerations might induce this Court to withhold its discretionary authority to grant certiorari, had the same question been presented in another circuit, are not here present. On the contrary, the existence of so large a volume—both relatively and absolutely—of personal injury actions that are governed by the norms established by the Court of Appeals for the Second Circuit, affirmatively calls for this court to exercise its corrective authority over the conduct of that Court, by granting certiorari in this case.

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[1] The Annual Reports of the Director of the Administrative Office of the United States Courts disclose that for the past five fiscal years 20% of the diversity cases presenting the issue of negligence in non-motor vehicle cases, 9% in motor vehicle cases, and 53% of the Jones Act and FELA cases presenting that issue have arisen in the Second Circuit. The Fifth Circuit, which is the only other circuit whose business approaches so large a percentage of the Federal Courts' negligence litigation, has 17% of the diversity non-motor vehicle negligence litigation, 19% of the diversity motor vehicle litigation, and only 2% of the FELA and Jones Act negligence litigation. It is not without significance that the Fifth Circuit is aligned with the Second Circuit in asserting an authority to overturn jury verdicts which the decisions here do not permit. See e.g. *Rhodes* v. *Metropolitan Life Ins. Co.*, 172 F. 2nd 183; *Atlantic Coastline R. Co.* v. *Mitchell*, 157 F. 2d 880; *Dowell* v. *Jowers*, 166 F. 2d 214. The figures follow:

	SECOND CIRCUIT				FIFTH CIRCUIT			
			Personal Injury				*Personal Injury*	
	F.E.L.A.	*Jones Act*	*Motor Vehicle*	*Other*	*F.E.L.A.*	*Jones Act*	*Motor Vehicle*	*Other*
1948	289	1,106	199	447	29	15	560	382
1947	214	1,135	160	362	20	11	406	372
1946	179	280	125	247	26	12	270	270
1945	114	276	128	297	2	3	193	213
1944	134	311	133	290	7	9	169	207
Total	930	3,108	745	1,643	84	50	1,598	1,444
Total in all Federal District Courts during 1944-1948	3,231	4,454	8,470	8,302	3,231	4,454	8,470	8,302
Percentage of total in Second and Fifth Circuits	29%	69%	9%	20%	3%	1%	19%	17%

CONCLUSION

Petitioner respectfully submits that this petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

BARENT TEN EYCK,
Counsel for Petitioner.

HATCH, WOLF & NASH,
VICTOR BRUDNEY,
BENJAMIN H. SIFF,
Of Counsel.

[APPENDICES FOLLOW]

APPENDIX A

The Seventh Amendment to Constitution of United States provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 50 (b) of The Federal Rules of Civil Procedure provides:

Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, this court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

APPENDIX B

Opinion by Nordbye, U. S. D. J.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

CIVIL 34-647

ISADORE B. BERNSTEIN,

Plaintiff,

vs.

LEOPOLD OLIAN and MORRIS CANTOR, co-partners doing business under the firm name and style of OLIAN & CANTOR and EMS CORP.,

Defendants.

ORDER SETTING ASIDE AND VACATING VERDICT OF THE JURY AND GRANTING PLAINTIFF A NEW TRIAL

The above-entitled cause was tried before the Court and jury, and a verdict of $7,000 was returned in favor of the plaintiff on June 27, 1947. Immediately upon the return of the verdict, plaintiff orally moved to set aside the verdict for inadequacy and that a new trial be granted. The motion was taken under advisement by the Court and the parties were requested to file briefs. The briefs have now been filed and duly considered.

Messrs. Hatch, Wolfe & Nash (Mr. Harry A. Gair, of counsel) all of New York City, appeared for the plaintiff in support of the motion;

and

Mr. Leo F. Potts (Mr. Charles H. Lane, of counsel) both of New York City, appeared for defendant Ems Corporation; and Mr. Frederick Mellor (Mr. Joseph F. Lenihan, of counsel), both of New York City, appeared for defendants Leopold Olian and Morris Cantor in opposition thereto.

It is well-recognized, of course, that the extent of the injuries and the resulting damages therefrom are fact questions for the jury. But where the testimony as to such issues is not disputed, it cannot be arbitrarily and capriciously disregarded by the jury. It must be remembered that the medical testimony in this case was wholly uncontradicted. The plaintiff was examined before trial by defendants' medical experts, but they were not called as witnesses. It is fair to assume, therefore, that their testimony was not substantially different from the opinion expressed by plaintiff's expert, which was to the effect that the accident in question was the direct cause of an injury to, and rupture of, the covering of the intervertebral disc between the sixth and seventh cervical vertebra, necessitating removal of the disc, and that the removal had injured the nerves in the spine. The hospital records of the Bellevue and Jewish Memorial Hospital may not confirm the injury to the disc, but neither do they negative such an injury. The jury must have found that plaintiff sustained something more than a superficial scalp wound when they assessed his damages in the sum of $7,000. The testimony was uncontradicted that plaintiff, a man 47 years of age, had not been able to follow any employment since the accident in July, 1945, and that he would be disabled from following any line of work in the future which would require a continuous eight-hour attention to his duties. Under the evidence, there can be no doubt that plaintiff's intervertebral disc was removed, and in view of the wholly undisputed testimony of Dr. Kolodny, it must follow that its

removal was necessitated by reason of the blow received at the time of the accident. In light of this undisputed testimony, which is not inherently improbable or subject to other inferences, it must follow that the jury should not be permitted to indulge in any conjecture of their own which is without support in the evidence, or to refuse arbitrarily to credit this testimony. An injury such as plaintiff sustained to the covering of the intervertebral disc, necessitating the removal of the disc, and the resulting injury to the nerves of the spine, pertain to the highly technical field of neurology and neurosurgery. Obviously, therefore, a jury, in absence of other evidence or inherent improbabilities in the medical testimony, should not be permitted to nullify such uncontradicted testimony by indulging in speculative excursions of their own into this specialized branch of medical science. There was nothing doubtful, suspicious, or improbable in Dr. Kolodny's testimony, nor in plaintiff's recital of the events which occurred after he arrived home in Los Angeles. Apparently the jury accepted a part of this testimony in determining the amount of damages, but arbitrarily refused to consider the entire testimony in appraising the different elements of damage for which plaintiff should recover compensation, if he was entitled to recover. Or it may be that there was some difference of opinion among the jurors as to the liability of one or both of the defendants and the verdict returned represents a compromise. The question of liability may well have caused some pronounced differences of opinion in view of the evidence and the applicable law. But whatever may have motivated the jury to do that which they did do, in light of the verdict which was returned, I am convinced that if plaintiff is entitled to recover, the amount of damages returned by the jury is grossly inadequate. I cannot in good conscience permit a verdict to stand which stultifies the ends of justice. Under the evidence, plaintiff should have had no recovery at all, or a recovery substantially in excess of $7,000. A mere recital and consideration of the

evidence reflecting the pain and suffering, the loss of earnings (which in itself would exceed the amount of the verdict), the permanent injuries, medical expense, and the prognosis for the future, strikingly demonstrate that the verdict is patently inadequate.

After due consideration, therefore, and being fully advised in the matter,

IT IS ORDERED: That the verdict of the jury in the above-entitled cause be vacated and set aside, and that the plaintiff be granted a new trial herein.

An exception is reserved to each of the defendants.

Dated this 1st day of August, 1947.

BY THE COURT:

GUNNAR H. NORDBYE
United States District Judge,
Acting by Assignment.

Supreme Court of the United States

OCTOBER TERM, 1945

No. 316

ISIDORE B. BERNSTEIN,

Petitioner,

against

EMS CORPORATION,

Respondent,

and

LEOPOLD OLIAN and MORRIS CANTOR, co-partners doing business under the firm name and style of OLIAN & CANTOR,

Defendants.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Maurice Wormser,
Leo F. Porth,
Counsel for Respondents.

Charles H. Lane,
Sidney J. Lane,
On the Brief.

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Supreme Court of the United States

October Term, 1949

No. 316

ISIDORE B. BERNSTEIN,

Petitioner,

against

EMS CORPORATION.

Respondent,

and

LEOPOLD OLIAN and MORRIS CANTOR, co-partners doing business under the firm name and style of OLIAN & CANTOR,

Defendants.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI*

Statement

The petition and the accompanying brief in this matter are incomplete and in many instances inaccurate.

The applicant has avoided any discussion of the vital point on which the unanimous Court of Appeals (174 F. [2d] 880) determined the case, namely, that there was complete lack of proof of notice to the landlord of any defect in the instrumentality which caused the injury.

Indeed, the evidence affirmatively established that there was no notice.

* References are to folios in record, unless otherwise noted.

Question Presented

The real issue presented on the appeal below was succinctly summarized by SWAN, J., in his opinion (pp. 436-437), wherein he said:

> "Assuming *arguendo* that the landlord did retain control over the site of the dangerous condition, nowhere in the record is there any basis for finding that it received any notice of the danger or could by the exercise of reasonable care have discovered it. A landlord is under no absolute duty to maintain in safe condition those portions of the building over which he reserves control. Unless he knows or in the exercise of reasonable care ought to know, of the existence of the defective condition, liability does not attach to him. *A. L. I. Restatement of Torts, §361; Hirsch* v. *Radt,* 228 N. Y. 100; *Kramer* v. *Stone,* 176 App. Div. 549, 551. The plaintiff concedes that Ems Corp. had no actual notice. Nor was there any evidence of conditions which should have caused the lessor to suspect the danger. Mr. Olian, it is true, testified that jarring and vibration of the ceiling was frequently caused by the moving of heavy cases of rayon by the tenant who occupied the floor above the store premises and that on one occasion he complained about it to the superintendent of the building. But the date of this complaint was early in 1942, before Ems Corp., had acquired title. Hence notice of the jarring and vibration given to the superintendent was not notice to an agent of the appellant. *And the vibrations did not produce any visible effects, for there were no bulges or cracks in the ceiling and no other lighting fixture had ever fallen. In short we can see no basis whatever for charging the lessor with notice of the faulty installation of the fixture.* To have discovered the defect, it would have been necessary to climb up on a ladder, remove the canopy and ex-

tract the screws from the base-plate to make sure they were of proper length. And since nothing pointed to this particular fixture as defective, such an inspection would have had to be made of all the electric fixtures in the ceiling. We are clearly of opinion that *when there is nothing to suggest faulty installation, the lessor's duty of 'reasonable care' does not require him to make that sort of an inspection.* To hold the appellant liable would in effect make the landlord an insurer of the safety of business guests. That is not the law. The lessor's motion to dismiss for failure of proof of negligence should have been granted. Accordingly the judgment must be reversed and the complaint dismissed. It is so ordered." (Italics ours.)

It is noteworthy that the determination now sought to be reviewed was reached after oral argument consuming two hours on March 8th, 1949, with no decision for eleven weeks thereafter until May 24th, 1949, thus evidencing careful, thorough and painstaking consideration by three Jurists whose ripe judicial experience and scholastic attainments have earned the respect and regard of Bench and Bar alike.

Reasons for Denying Writ

Defendant Ems had no notice of any alleged defect

Petitioner alluded (Brief, p. 3) to the opinion of Judge NORDBYE after the first trial; but Judge NORDBYE evidenced doubt as to plaintiff's right to recover, as witness (p. 26):

> "The question of liability may well have caused some pronounced differences of opinion in view of the evidence and the applicable law * * * *if* plaintiff is entitled to recover, the amount of damages returned by the jury is grossly inadequate." (Italics ours.)

Petitioner contended (Brief, p. 4) that the Court below, on its own view of the evidence, concluded that petitioner had produced insufficient evidence and could never do otherwise. That is not so. The Court of Appeals acted upon the record as it found it; and when it found that *no* evidence had been adduced respecting so vital an element in negligence law as "notice," the Court had no choice except to dismiss. As an example, in *Still* v. *Union Circulation Co., Inc.* (101 Fed. (2d) 11), the Trial Judge held that there was no evidence upon which a reasonable finding of liability could be based to support plaintiff's verdict, he set the verdict aside and directed a verdict for defendant, the Circuit Court of Appeals affirmed, and this Court denied certiorari (308 U. S. 565).

Plaintiff here clamors for a new trial which can avail him nothing. The record of this trial established that on no possible theory can he present evidence which would uphold a verdict against this defendant Ems Corp.

His very able trial counsel would have adduced evidence of notice if any were available to him.

There were never any cracks or bulges in the ceiling (fols. 594-7; 633-4; 694; 865-6).

No fixtures had ever fallen before this one (fols. 599; 630; 700).

The ceiling admittedly was in good condition previous to to this accident (fols. 597; 633-4; 864-5).

It is well known, as the testimony established, that cracks frequently appear as a warning of impending disaster (fols. 763; 786-7), but here there were *none* (*supra*).

There was thus no evidence whatsoever of any indication that the ceiling was in any way defective or that any accident would occur and when the Circuit Court of Appeals inquired of plaintiff's counsel, on the argument, to point to the least reference to evidence of "notice", he found himself unable to do so (other than the jarring mentioned

in Judge SWAN's opinion,—about which no complaint was made at any time during all the lengthy period of three years after Ems Corp. had acquired title).

The tenant Olian specifically testified that he "never observed anything wrong with the ceiling or the lights or the fixtures" (fols. 633-4). As the tenant in possession never observed any dangerous condition, and hence never in any way directed the attention of the landlord thereto, it stands to reason that the landlord, which was always *out* of possession, had neither actual nor constructive notice.

Though the landlord, the Ems Corp., owned the building, purchasing the same in November 1942 (fols. 706-7), Olian & Cantor, the tenants, had come into the building long before,—in 1938 (fols. 584-6; 626-7).

It was the tenants who installed, at their own expense, the particular light globe, including the canopy, at the ceiling (fols. 587-90; 624; 627-30; 893-4). This was done approximately *four years before* the Ems Corp. purchased the building, and approximately *seven years before the accident* (fol. 626).

Admittedly, there was no notice by the tenant to the landlord, Ems Corp., of any defective condition.

In the recent case of *Lefkowitz* v. *City of New York*, 297 N. Y. 769, affirming 269 A. D. 666, the New York Court of Appeals unanimously affirmed a judgment dismissing the complaint, on the ground that there was no evidence of actual or constructive notice to the defendant of the defective condition. The Appellate Division had said (269 App. Div. at p. 666):

> "There is no evidence of any actual notice to defendant that the turnstile was out of order before the alleged accident. Nor is there sufficient evidence of any constructive notice to charge the defendant with knowledge of the defective condition complained of."

See also:

Molte v. *Corn Exchange Brank Trust Co.*, 267 N. Y. 544;
Cullings v. *Goetz*, 256 N. Y. 287;
Altz v. *Leiberson*, 233 N. Y. 16, 18;
Irons v. *William Steiner Sons & Co., Inc.*, 246 N. Y. 599;
Weingard v. *Putnam Theatrical Corp.*, 225 App. Div. 808;
Burnstein v. *Haas*, 298 N. Y. 596, 597.

Petitioner urged (p. 5) that the fixture was defectively fastened to the ceiling beam and (p. 6) that therefore the plaster would be pulverized "immediately" upon insertion and that this would be visible to anyone working at it.

Not only is that statement unsupported by any reference to the record, but it is contradicted by what has already been demonstrated as to the total absence of any cracks or bulges in the ceiling (594-7; 633-4; 694; 865-6) and by the testimony of the tenant *in possession* that the ceiling was in *good* condition prior to the accident (597; 633-4; 864-5).

An effort has been made (p. 6) to charge defendant with notice on the theory that jarring of the ceiling was claimed to be caused by reason of the action of tenants above Olian & Cantor.

None of that evidence was introduced in plaintiff's case, so that, whatever its effect might have been, a *prima facie* case was not established, and the point was saved by both motions to dismiss.

Moreover, the evidence in that respect was wholly inadequate. Over objection, Olian was permitted to testify that in handling cases of rayon in the loft above his store, there

was knocking and jarring (fols. 672-6). He said that it happened in all parts of the store, but that it never induced him to make any examination whatever of the ceiling (fol. 676).

Manifestly these alleged occurrences had no effect on the ceiling, for Olian expressly testified that he *"never observed anything wrong with the ceiling or the lights or the fixtures"* (fols. 633-4).

[See, too, Judge SWAN's opinion, *supra* (Record, p. 437).]

A definite idea as to the unimportance of this "knocking and jarring" may be obtained when it is remembered that the testimony disclosed that it had continued for years and right up to the time of trial, without any evidence whatever of damage either to the ceiling or to the fixtures.

Moreover, the accident in suit was the *only* accident of its kind (fol. 700).

Olian claimed that he notified the superintendent of the building (fols. 701-4), but that was stoutly denied (fols. 837-9).

It developed, however, that this alleged notice to the superintendent was given in early 1942, while Ems never took possession until November 1942 (fols. 706-7) and—most important—the superintendent was *only* notified on that *one* occasion (fol. 707).

Hence it affirmatively appeared that these noises were *never* called to anyone's attention during the three years of ownership of the building by this defendant, Ems Corp. How then can this defendant be held responsible, even if notice was given to the superintendent as testified, on one occasion, and over three years before the accident—in view of the other relevant facts, particularly as such alleged notice was given months before defendant became the owner and at a time when the superintendent was not its employee?

The testimony as to one and *only one* complaint (707) refutes the untrue statement in petitioner's brief (p. 7) referring to "complaints" (plural), and of course, there was no evidence of any complaint *after* Ems Corp. became the owner of the premises.

Landlord out of possession and control not liable to a business visitor of tenants

Petitioner's brief (p. 7) tabulated certain provisions of the lease, but there were other significantly *omitted* clauses in that lease which were vitally significant.

Paragraph "5" of the lease specifically provided as follows:

> "Tenant shall take good care of the demised premises, *and of the fixtures therein.*"

That paragraph, then, imposed liability on the tenant and *not upon the landlord.*

The landlord was given permission to repair any damage to the demised premises at the expense of the tenant if caused by the tenant or its employees; but that provision imposed *no obligation upon the landlord to do so.*

Another provision of the lease, wholly disregarded by the Trial Judge, was paragraph 10, which expressly exonerated the owner from liability for injury from falling plaster or appliances *unless due to the landlord's negligence.*

Paragraph "16" of the lease provided that the tenant would permit the landlord to install and maintain pipes and conduits through the premises, and that the landlord could enter them for the purpose of examination and to show them to prospective purchasers and lessees or to make repairs; but the concluding sentence specifically provided that it did not impose any obligation or liability on the landlord for care, supervision or repair other than as therein otherwise provided.

In short, the obligation of maintenance of the leased premises, as such, rested *upon the tenants.* The operation and maintenance of lighting fixtures, especially such as were installed by the tenants, would devolve exclusively *upon the tenants.*

In the case of *Homin* v. *Cleveland and Whitehill Co.,* 281 N. Y. 484, the Court of Appeals considered the liability of an owner-landlord to an injured window cleaner, under the provisions of Section 202 of the Labor Law. The issue, briefly stated, was whether the owner was "in charge" of the building involved in the accident, by reason of a clause in the lease which reserved to the landlord the "privilege to enter, to examine the premises or to make repairs which it thought to be requisite" (p. 489). The Court held (p. 489):

> *"Mere reservation by the landlord of the right to inspect the building or to make repairs, if necessary, did not operate to place it in charge of the building or of the particular premises where the accident happened nor impose upon it any obligation to the deceased. Cullings* v. *Goetz,* 256 N. Y. 287."

A complete answer to plaintiff's claims in the case at bar may be found in the closely analogous case of *Potter* v. *N. Y., O. & W. Ry. Co.,* 261 N. Y. 489, wherein the New York Court of Appeals said at page 495:

> "* * * The railroad men, so far as the record shows, never entered the pocket, except on *rare* occasions to make *needed repairs.* That they so entered was not sufficient to indicate that the railroad reserved a measure of control over the pocket, or retained power *to forbid or permit visitors to make entry thereto.* (*Cullings* v. *Goetz, supra.*)"

The same condition existed here.

The employee of Ems might have gone into this store on rare occasion to repair leaks (fols. 890-2; 907-8), but Ems had *no master key* (fols. 702; 866-7); Ems was never in the premises for painting between 1941 and 1945 (fol. 670). Ems had no "power to forbid or permit visitors to make entry thereto," and the complete absence of any control by Ems over the fixture in question was demonstrated by the fact that *after* its superintendent cleaned up the debris (fols. 613; 854), *he left the fixture and the globe in the premises of Olian & Cantor* (fol. 910).

Furthermore, with such ready response to calls from the tenant for leaks (fols. 890-2; 907-8), the Superintendent would certainly have given attention to so vital a matter as a damaged ceiling or threatened injury as a result thereof, if it had been called to his attention and if the landlord was responsible for the same.

In view of the terms of the lease which merely confer upon the landlord the privilege to make repairs, the fact that the landlord did make such repairs after the accident in no way constituted an admission of an obligation to do so. See *Elefante* v. *Pizitz* [182 App. Div. 819 at pp. 821-822 (aff'd 230 N. Y. 567)].

Exception was taken whereby this point was preserved (fols. 1239-1240) and, in view of the terms of the lease, the act of the landlord in making the repairs was purely gratuitous and, as a matter of law, could not be construed as a recognition of legal liability.

The provisions of the lease imposed *no obligation* on the landlord to make any repairs.

Paragraph "4" forbade the tenant to drill into the premises or to do any boring or to string any wires. Nevertheless, that was precisely what the tenants *did* in this case in installing lamps and globes in their store. They might do those acts with the prior written consent of the land-

lord, but certainly that particular provision of the lease imposed no liability on the landlord to the tenant who willfully violated it or to the tenant's customers.

It is *incomprehensible* that the jury should have exonerated the tenants *in* possession and inculpated the landlord *out* of possession, a point strongly urged by defendant in the Court below, but not necessary to its determination. Petitioner states (p. 9) that the Trial Judge denied petitioner's motion to set aside the verdict in favor of the tenants. He should have added (in all fairness) that that occurred only *after* the reversal in the Circuit Court of Appeals.

The petitioner claimed (p. 9) that the Circuit Court of Appeals reversed and dismissed "solely" on the ground that the evidence was insufficient to show that respondent knew or had reasonable cause to know of the dangerous nature of the ceiling. That was only one of the reasons.

A reference to the opinion will demonstrate (Rec., p. 436) that the Court alluded to *Cullings* v. *Goetz,* 256 N. Y. 287, 290, a notable decision written by Judge Cardozo in a suit involving the question of lessor's liability at the instance of a lessee or visitors of a lessee for failure to keep premises in repair under a lease.

Judge Cardozo said (256 N. Y. at p. 290), and it has been oft repeated since:

> **"* * * By preponderant opinion, occupation and control are not reserved through an agreement that the landlord will repair * * *. The tenant and no one else may keep visitors away till the danger is abated, or adapt the warning to the need. The landlord has at most a privilege to enter for the doing of the work, and at times not even that if the occupant protests." (Emphasis ours.)**

At page 292 he further said:

> **"If there is no remedy for the tenant, there is none for visitors or relatives present in the tenant's right** (*Miles* v. *Janvrin, supra,* at p. 440; *Elefante* v. *Pizitz,* 182 App. Div. 819, 821)."

See also:

Lafredo v. *Bush Terminal Co.,* 261 N. Y. 323, at p. 325;
Campbell v. *Holding Co., Inc.,* 251 N. Y. 446, at p. 448;
Kosier v. *Pomrinse,* 249 App. Div. 196, at p. 197;
Stein v. *Pershing Square Bldg. Co.,* 191 Misc. 30, at p. 31;
Doyle v. *Union Pacific Railway Co.,* 147 U. S. 413, at pp. 422, 423;
Dyer v. *Robinson,* 110 Fed. 99, 100, 101.

The most recent exposition of this phase of the law of New York was *Dennis* v. *Rockefeller Center, Inc.,* 270 App. Div. 524 (aff'd 296 N. Y. 741), where the Trial Court charged that a landlord was under a non-delegable duty to maintain the floors, walls, ceilings and staircases in a reasonably safe condition; that, if the owner in that case created the condition causing the accident, it was not necessary to find that it had notice thereof, but if it had merely permitted the condition to exist, then the jury would have to inquire whether the owner actually knew, or should, through long lapse of time, have known of its existence, and, in that connection, that the question would arise of access to the portion of the leased premises where the accident occurred.

The Appellate Division, in reversing the judgment for plaintiff and dismissing the complaint, said at page 526:

> "The jury was thus permitted, without finding that the landlord or its contractors had created the

condition, to fasten liability on the landlord simply by finding that the condition was of such duration that the landlord should have learned of it.

The charge cannot be sustained. Apart from statutory imposition, as in the case of multiple dwellings, *a landlord is not liable to employees or invitees of a tenant for the condition of leased premises.* (Cullings v. Goetz, 256 N. Y. 287; Werter v. Samsky, 286 App. Div. 913.) Plaintiff points out that the landlord operated and managed the building, and had an obligation under the lease to clean the premises, and plaintiff claims the landlord thereby assumed responsibility for the condition of the premises. The management and operation here do not appear to be more than the usual landlord management and operation of an office building, which do not constitute a degree of control of leased space to include responsibility to a tenant's invitee for the condition of leased premises, and mere access to the leased premises for cleaning purposes would not create such responsibility. Whatever might be the landlord's responsibility on a showing that the condition which caused the accident was of its creation, the landlord may not be held, as the charge permitted it to be held, for a condition in leased premises of unidentified origin and duration." (Italics ours.)

That case (decided by the Court of Appeals in 1948) was much later than *Scudero* v. *Campbell* or *Antonsen* v. *Bay Ridge Savings Bank* referred to in the Trial Court's opinion (1267-8). Based as it was on *Cullings* v. *Goetz,* it is clear indication that the classic opinion of Judge Cardozo in *Cullings* v. *Goetz* is still the law and remains unaffected by the readily distinguishable decisions mentioned by the Trial Court.

There is nothing "shocking" in the result of this case as claimed by petitioner in his brief (p. 10), nothing more

shocking than in the *Still* case, *supra,* and the many other decisions in which plaintiffs fail to establish a valid cause of action.

Petitioner himself cited (p. 10) *Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 243, wherein this Court recognized the power of the Circuit Court of Appeals to reverse and direct judgment n. o. v. That power was properly exercised here, where there was not only a total absence of proof of notice, but affirmative proof of *no notice.*

The passing intimation that plaintiff should be afforded an opportunity to correct a deficiency when the Court finds that the jury's verdict is against the weight of evidence (p. 12) is wholly inappropriate, since the determination here was not based on weight of evidence, but wholly on *absence of any evidence* as to a vital factor in the case.

And so the unfair and caustic criticism of the Court of Appeals, Second Circuit (pp. 12-13) should receive not even scant consideration, both for the reason that its action in overturning the verdict of this jury was not only based on such extended argument and careful and lengthy review by three outstanding jurists, but also was predicated on an affirmative showing of the absence of an essential prerequisite to liability on the part of this defendant.

The cases cited by petitioner (p. 13) all had reference to the issue of control. One of them, *Rosenberg* v. *Rosenberg,* 247 App. Div. 765, is actually a determination in our favor, for there the evidence was that defendant retained in his possession, and exercised dominion and control over, the particular instrumentality which caused the injury. *There,* defendant, under the proof, was upon the premises frequently.

Here the tenants were in sole possession and control; the Trial Court so charged (fol. 1220). Furthermore, the Trial Court refused to charge the requests of the tenants that they were not in control of the ceiling and the electrical

fixtures (fol. 1236). If the tenants were thus in possession and control, as the Trial Court charged, and if there was nothing to attract the attention of the tenants to any defective condition, as the tenant Olian testified (fols. 633-4), then the landlord could not be held chargeable with knowledge or notice, and therefore could not be ruled to be negligent, especially where the tenants in possession and control were expressly exonerated by the jury. Therefore, the verdict exonerating the tenants and charging the landlord with liability, was manifestly preposterous as well as inconsistent with the admitted facts of the case. It was the result of misplaced sympathy and of bias against a large corporation.

The basic point of lack of notice to the landlord was expressly reserved on the motions to dismiss, being particularly specified on each occasion as one of the grounds for the motion (fols. 568-9; 1175-6).

In each instance, exception was duly noted to the denial of the motion (fols. 579; 1176).

No mention whatsoever of the matter of "notice" was made, however, in the Court's cryptic instructions to the jury. The jury thus was misled.

Petitioner erroneously contended (p. 14) that defendant could have removed the canopy and discovered the allegedly defective condition of the ceiling, but, as Judge SWAN pointed out (Rec., p. 437):

> "* * * In short we can see no basis whatever for charging the lessor with notice of the faulty installation of the fixture. To have discovered the defect, it would have been necessary to climb up on a ladder, remove the canopy and extract the screws from the base-plate to make sure they were of proper length. And since nothing pointed to this particular fixture as defective, such an inspection would have had to be made of all the electric fixtures in the

> ceiling. We are clearly of opinion that when there is nothing to suggest faulty installation, the lessor's duty of 'reasonble care' does not require him to make that sort of an inspection. To hold the appellant liable would in effect make the landlord an insurer of the safety of business guests. That is not the law."

It was urged by petitioner (p. 14) that notice had been given to the respondent's agent, but as Judge SWAN said:

> "* * * But the date of this complaint was early in 1942, *before* Ems Corp. had acquired title. Hence notice of the jarring and vibration given to the superintendent was not notice to an agent of the appellant."

Cases cited by petitioner distinguished

The few cases in which this Court reversed the Circuit Court of Appeals for usurping the jury's function (Petr.'s brief, p. 15) have no application here at all.

Each and every one of those cases presented an instance in which there was *some* proof upon which the verdict of the jury might be based. *Conway* v. *O'Brien* was a case where this Court held the evidence sufficient to go to the jury on the issue of gross negligence, which was an essential element there; *Jacob* v. *New York City* was an action where the question at issue was whether the injury was due to a defective or insufficient appliance; *Berry* v. *United States* simply held that the power to dismiss in the Appellate Court did not deprive the jury of the power to weigh the evidence and decide contested issues of fact.

In the *Conway* and *Berry* cases no motion had been made, as here, for judgment n.o.v. following the verdict; but in all three cases the decisive factor was the presence of sufficient evidence to warrant the jury in deciding one way or the other, and *not,* as here, the total *absence* of *all* evidence on so essential an element of the case as "notice".

The petitioner (p. 16) alluded to certain hypothetical injustices resulting from the failure of a Circuit Court of Appeals to agree with a Trial Judge. If the Trial Judge should dismiss a complaint (as should have been done here) because of failure on plaintiff's part to prove an essential element of his cause of action, there is surely no injustice to anyone if the Appellate Court does so. The injustice would be if it lacked the courage to do so. The petitioner's argument is simply a strained effort to find some basis for his petition for certiorari in an ordinary negligence action.

Petitioner's claim (p. 17) that the decision here produces a conflict with the New York decisions is demonstrably unfounded, for the result here conforms with those decisions as heretofore established. As appears from the *Lefkowitz* case and the many others cited and quoted, *notice* of a defect is a *sine qua non* of liability in a negligence case of this type.

Petitioner argues (p. 19) that he has been denied recovery against either landlord or tenant. It certainly is not the fault of the Circuit Court of Appeals that the jury erroneously exonerated the tenants in possession and control and that the Trial Judge erroneously denied the plaintiff's motion to set aside the verdict in favor of those tenants. That conclusion can be readily remedied by an appeal on plaintiff's part to the Court of Appeals against the Trial Judge's erroneous determination in favor of the tenants.

Nor is it true, as boldly stated by petitioner (p. 19), that the decision of the Circuit Court of Appeals is in conflict with the opinion of two District Judges and the verdict of two juries and in flat conflict with the decisions of the New York Courts. Where one District Judge felt that the low verdict was due to the question of liability which "may well have caused some pronounced differences of opinion," and where both District Judges erroneously allowed the

juries to consider the case without requiring any evidence whatsoever of notice, and where the decisions of the New York Courts explicitly and unequivocally require proof of notice before liability could ever be fastened upon a landlord out of possession and control, the determination of the Court of Appeals in the case at bar was unquestionably correct and just.

No Question of Public Importance is Involved and no Law Point Which is in Serious Doubt or in Conflict

While petitioner asks for a writ of certiorari and seeks to create a question of public importance, there is no real basis for any such hackneyed claim. "Much ado about nothing"!

It is preposterous for petitioner to urge that any question of great public moment is involved or that there has been any decision herein which involves a conflict of authority. It is merely a question of applying the law to the set of facts herein involved.

This case was exhaustively considered by the eminent Court of Appeals, and no question of public importance or conflict of authority is involved which warrants further review by this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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